Professor Lili Levi
University of Miami School of Law
1311 Miller Drive
Coral Gables, Florida 33146
(305) 284-2289
llevi@law.miami.edu

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Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

To whom it may concern:

I am hereby submitting the following Introduction from my forthcoming article – *"Smut and Nothing But": The FCC, Indecency, and Regulatory Transformations in the Shadows*, 65 ADMIN. L. REV. 2 (forthcoming Sept. 2013) – as a Comment in the Commission's inquiry into broadcast indecency regulation in Docket 13-86. I have not included the entire article as it is currently in its final technical edits by the staff of the Administrative Law Review. I will be happy to forward it to the Commission as soon as it is produced.

Sincerely,

Lili Levi
Professor of Law

"Smut and Nothing But"[1]: The FCC, Indecency, and Regulatory Transformations in the Shadows, 65 ADMIN. L. REV. 2 (forthcoming Sept. 2013)

Lili Levi[2]

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[1] Tom Lehrer, *Smut*, "That Was the Year That Was" (Warner Bros./WEA 1965) ("All books can be indecent books/Though recent books are bolder,/For filth (I'm glad to say) is in/the mind of the beholder./When correctly viewed,/Everything is lewd./(I could tell you things about Peter Pan,/And the Wizard of Oz, there's a dirty old man!)

[2] Professor of Law, University of Miami School of Law. I am particularly grateful to Glen Robinson, Jon Weinberg, Lyrissa Lidsky, Tom Krattenmaker, and Steve Schnably for their very helpful detailed comments. Many thanks are also due to Caroline Bradley, Adam Candeub, Charlton Copeland, Michael Froomkin, Marnie Mahoney, Ralph Shalom and participants in the UM Half-Baked Ideas Forum for conversations,
[2] Professor of Law, University of Miami School of Law. I am particularly grateful to Glen Robinson, Jon Weinberg, Lyrissa Lidsky, Tom Krattenmaker, and Steve Schnably for their very helpful detailed comments. Many thanks are also due to Caroline Bradley, Adam Candeub, Charlton Copeland, Michael Froomkin, Marnie Mahoney, Ralph Shalom and participants in the UM Half-Baked Ideas Forum for conversations, suggestions and comments. Sophia Montz deserves recognition for valuable research assistance. All errors are mine.

A. Reframing the FCC's articulated reasons for indecency regulation
   1. A new take on assisting parents – moral zoning to provide a "safe haven"
   2. From individual to social harm – reframing the independent governmental interest in the wellbeing of children
   3. The FCC's shift to contractual arguments
B. The risks of the FCC's reframed regulatory justifications
   1. The limits of safe havens
   2. The perils of regulating to prevent social harm
   3. The dangers of a turn to proto-contractual regulatory justifications

IV. Why the FCC's Current Indecency Regime Is Bad Policy

A. Unintended consequences: the threats to local programming and public broadcasting

B. The problems with indecency regulation through a political lens

C. The availability of less restrictive technological solutions

D. What are broadcasters likely to do?

V. Exploring the Second Best: Recommendations for Regulatory Restraint on Three Fronts

A. Chill reduction via proportionality in forfeitures

B. Institutional adjustments -- improving the FCC's processes
   1. Improving the process for handling indecency complaints
      a. Promoting transparency, consistency, and accountability in indecency review
      b. Counting complaints
      c. Conditioned settlements
   2. Standards changes:
      a. Adopting presumption of no liability in close cases
      b. Reversing negligent indecency approach and the broadcaster standards bootstrap
      c. Dismissing complaints not submitted by actual program viewers
      d. Using context to exculpate
      e. Adopting a news exemption (or reversing news-related change)
      f. Limiting the aesthetic necessity inquiry
      g. Considering economic hardship and whether the broadcaster is a public station

C. Consumer Empowerment – Improvements in the TV rating system and its application

D. Considering the Limits of the Second-best

Conclusion

Introduction

For almost a century, American broadcasting has received a lesser degree of constitutional protection than the print medium. It has been subject to Federal Communications Commission (FCC or Commission) regulation under an expansive

public interest standard.[3] Technological change, including the growth of cable and the Internet, has increasingly intensified competitive pressures on broadcasting. To some, it has also heightened the irrationality of broadcast exceptionalism.[4] When the FCC's enhanced indecency prohibitions swept up U2 front-man Bono's fleeting expletive on a music awards show aired live,[5] broadcasters finally thought they had found a vehicle to force revolutionary changes to the second-class status of broadcast media.[6]

However, in the broadcasters' first challenge to the Commission's fleeting expletive policy, the Supreme Court in *Fox Broadcasting Company v. FCC* (*Fox I*) rejected a challenge under the Administrative Procedure Act against the Commission's process for changing its indecency policies.[7] The broadcasters' second challenge—to the Commission's indecency policy in its entirety (and potentially to the whole edifice of

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[3] Communications Act of 1934, Pub. L. No. 73-416, § 312(b), 48 Stat. 1064, 1087 (1934) (codified as amended at 47 U.S.C. §§ 151–613 (2000)).

[4] For a recent argument that technological change has completely undermined justifications for lesser First Amendment protection for broadcasting, *see generally* Thomas W. Hazlett, Sarah Oh & Drew Clark*, The Overly Active Corpse of Red Lion*, 9 NW. J. TECH. & INTELL. PROP. 51 (2010).

[5] Complaints Against Various Broadcast Licensees Regarding Their Airing of the"Golden Globe Awards" Program, 19 FCC Rcd. 4975 (2004).

[6] *See, e.g.*, John Eggerton, *Tech Policy Groups Call on Supreme Court to Overturn Pacifica Decision,* BROAD. & CABLE (Nov. 14, 2011), http://www.broadcastingcable.com/article/476688-Tech_Policy_Groups_Call_on_Supreme_Court_to_Overturn_Pacifica_Decision.php.; *see also* Christopher S. Yoo, *Technologies of Control and the Future of the First Amendment*, 53 WM. & MARY L. REV. 747 (2011) (suggesting that the *Fox II* Court "will finally be in a position to address the underlying First Amendment issues" and offering "a qualified defense of the libertarian vision of free speech associated with classical liberal theory" in support of revising the First Amendment status of broadcasting); *cf.* Brief for Amici Curiae Former FCC Officials in Support of Respondents, FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307 (2012) (No. 10-1293), 2011 WL 5544813 [*hereinafter* Brief for Former FCC Officials].

[7] FCC v. Fox Television Stations, Inc. (*Fox I*), 556 U.S. 502 (2009).

broadcast regulation) in *FCC v. Fox (Fox II)*[8]—was no more successful. On June 21, 2012, in a profoundly anti-climactic opinion, the Supreme Court refused to address the First Amendment status of broadcasters and simply absolved the petitioners from liability for indecency on narrow due process grounds of fair notice.[9]

Nevertheless, the Court's silence speaks volumes. Its reticence to reach the broader regulatory questions percolating in the *Fox* cases implicitly suggests that a majority is not unduly troubled by continuing the exceptional treatment of indecent broadcasting. The *Fox I* and *Fox II* opinions reveal a Court unlikely to overrule its prior broadcast indecency precedent—*FCC v. Pacifica*[10]—or to find the Commission's overall indecency regime unconstitutional.

At the same time, the Court in *Fox II* invited the Commission to consider its approach in light of the public interest.[11] After a lengthy silence, the FCC recently issued a Public Notice seeking comment "on whether the full Commission should make changes to its current broadcast indecency policies or maintain them as they are."[12] The Notice indicated that, in the interim, the Commission's Enforcement Bureau had focused on

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8 FCC v. Fox Television Stations, Inc. (*Fox II*), 132 S. Ct. 2307 (2012).

9 *Id.*

10 FCC v. Pacifica Foundation, 438 U.S. 726 (1978).

11 *Fox II*, 132 S. Ct. at 2310 ("[T]his opinion leaves the Commission free to modify its current indecency policy in light of its determination of the public interest and applicable legal requirements.")

12 *FCC Reduces Backlog of Broadcast Indecency Complaints by 70% (More than One Million Complaints); Seeks Comment on Adopting Egregious Cases Policy*, Public Notice, DA 13-581, 2013 WL 1324503 (Apr. 1, 2013) (*2013 Indency Notice*). The *2013 Indecency Notice* was published in the Federal Register on April 19, 2013. 78 Fed. Reg. 23,563 (Apr. 19, 2013). Thereafter, at the request of the National Association of Broadcasters, the Commission extended the deadline for filing comments in the proceeding. *FCC Extends Pleading Cycle for Indecency Cases Policy*, Public Notice, DA 13-1071, GN Docket No. 13-86 (May 10, 2013).

"egregious cases" and reduced its backlog of pending indecency complaints by 70%.[13] While this hints that indecency enforcement was not the former FCC Chairman's top priority,[14] the current public comment proceeding officially opens the issue for public discussion. Almost 20,000 responsive comments – most urging stringent indecency enforcement – had been filed with the Commission as of May 2013[15] and close to 100 groups recently sought to put Congressional pressure on the agency to oppose changes

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[13] *2013 Indency Notice*, supra note 12. [LL: Kyle, I don't know why Word isn't creating a footnote 13 here. It'll mess up all my supra numbering, I'm afraid!!] (The agency had originally made an unofficial statement that the Chairman had asked the staff to focus on the most egregious cases. Doug Halonen, *FCC to Back Away From a Majority of Its Indecency Complaints*, THE WRAP (Sept. 24, 2012), http://www.thewrap.com/tv/column-post/fcc-back-away-majority-its-indecency-complaints-57766.) The *2013 Indecency Notice* explained that more than a million complaints had been dismissed "principally by closing pending complaints that were beyond the statute of limitations or too stale to pursue, that involved cases outside FCC jurisdiction, that contained insufficient information, or that were foreclosed by settled precedent." *Id*.

[14] On the place of indecency on former Chairman Julius Genachowski's agenda, s*ee* Brendan Sasso, *FCC Shows Little Interest in Policing Indecency on TV*, THE HILL (Feb. 2, 2013), http://thehill.com/blogs/hillicon-valley/technology/280679-fcc-shows-little-interest-in-policing-tv-indecency (suggesting that Chairman Genachowski "will leave the issue for his successor to handle"); Kenneth Jost, *Indecency on Television*, 9 CQ RESEARCHER 965, 982 (Nov. 9, 2012) (reporting media lawyers' views that "the indecency issue ranks low on the FCC's list of priorities."). Indeed, after a Boston Red Sox player responded to the Boston Marathon massacre by saying "[t]his is our f—ing city, and nobody is going to dictate our freedom," at a broadcast game, Chairman Genachowski tweeted "David Ortiz spoke from the heart at today's Red Sox game. I stand with Big Papi and the people of Boston - Julius." Elizabeth Titus, *FCC Chairman Julius Genachowski tweets on David Ortiz f-bomb*, POLITICO, Apr. 20, 2013, *available at* http://www.politico.com/story/2013/04/fcc-julius-genachowski-david-ortiz-twitter-90376.html.

In addition, the Department of Justice dismissed a case against Fox for an episode of the "reality" show *Married By America* featuring pixilated nudity and sexual situations in bachelor and bachelorette parties. John Eggerton, *DOJ, FCC Drop Pursuit of Fox 'Married by America' Indecency Fine*, BROAD. & CABLE (Sept. 21, 2012), http://www.broadcastingcable.com/article/489505-DOJ_FCC_Drop_Pursuit_of_Fox_Married_by_America_Indecency_Fine.php.

[15] www.fcc.gov

weakening indecency enforcement.[16] Incidents such as those at Super Bowl XLVII — Baltimore Ravens quarterback James Flacco's declaration that his team's victory "is fucking awesome" and his teammate's audible "holy shit" after the game—will doubtless keep the issue on the public and administrative agenda.[17] Indecency complaints—many generated by and made into cause celèbres by conservative groups[18]—have been holding up license renewals, some for almost a decade.[19] Despite its reduced indecency backlog, the Commission is still facing hundreds of thousands of pending complaints..[20]

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[16] John Eggerton, *PTC, Others Push Hill to Pressure FCC on Indecency*, Broadcasting & CABLE ONLINE, May 8, 2013, *available at* http://www.broadcastingcable.com/article/493336-PTC_Others_Push_Hill_to_Pressure_FCC_on_Indecency.php (describing letter sent by groups to committee overseeing FCC).

[17] *See, e.g.*, Brendan Sasso, *Parents Group Urges FCC to Crack Down on CBS over Super Bowl Profanity*, THE HILL (Feb. 4, 2013), http://thehill.com/blogs/hillicon-valley/technology/280871-parents-group-urges-fcc-to-crack-down-on-cbs-over-super-bowl-profanity; John Eggerton, *Ravens On-Air Swearing Comes During Live Portion of Super Bowl Coverage*, BROAD. & CABLE (Feb. 4, 2013), http://www.broadcastingcable.com/article/491679-Ravens_On_Air_Swearing_Comes_During_Live_Portion_of_Super_Bowl_Coverage.php. Complaints were also raised with the FCC over rapper M.I.A.'s obscene gesture during the halftime show of Super Bowl XLVI in 2012. *See, e.g.*, Amy Schatz & Christopher S.Stewart, *Super Bowl's Big TV Score*, WALL ST. J., Feb. 7, 2012, http://online.wsj.com/article/SB10001424052970204369404577206571361934132.html .

[18] *See* Lili Levi, *The FCC's Regulation of Indecency*, FIRST REPORTS (First Amend. Ctr., Nashville, Tenn.), Apr. 2008, at 4, 28, 36, 45 [hereinafter Levi, FIRST REPORTS]; Lili Levi, *Chairman Kevin Martin on Indecency: Enhancing Agency Power*, 60 FED. COMM. L.J. 1, 19 (2008), http://www.law.indiana.edu/fclj/pubs/v60/no1/Levi_Forum_Final.pdf [hereinafter Levi, *Chairman Kevin Martin*]; *see also* Parents Television Council, Broadcast Indecency Campaign, *available at* http://w2.parentstv.org/main/Campaigns/Indecency.aspx (last visited May 8, 2013).

[19] *See, e.g.*, David Oxenford, *As License Renewal Cycle Approaches - Dealing With Last Cycle's Applications Held Up By Indecency Complaints*, BROADCAST LAW BLOG (March 2, 2011, 6:43 PM), *available at* http://www.broadcastlawblog.com/2011/03/articles/indecency/as-license-renewal-cycle-approaches-dealing-with-last-cycles-applications-held-up-by-indecency-complaints/. *See also* n. ___, *infra*.

[20] Former Commissioner McDowell testified before a Congressional committee that the agency its pending backlog of approximately 1.5 million complaints against 9,700

Unfortunately, the *2013 Indecency Notice* explicitly seeks comment only on the appropriate treatment of fleeting expletives and nudity.[21] Both judicial and scholarly attention has focused on the Commission's about-face regarding the acceptability of fleeting expletives.[22] Yet the Commission should take this opportunity to assess its *overall* indecency regime.[23] The first step in that assessment must be to reveal the

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programs, and had remaining 500,000 complaints about 5,500 programs. *Before the H. Comm. on Energy and Commerce Subcomm. on Commc'ns and Tech., Oversight of The Fed. Commc'ns Comm'n,* Dec. 12, 2012, at 7, *available at* 2012 WL 6202231 (statement of Commissioner Robert M. McDowell, Fed. Commc'ns Comm'n). More recently, the *2013 Indecency Notice*, supra note 12 asserted a 70% reduction in the Commission's indecency backlog, leaving 30% of the complaints in play. The *Notice* also explicitly stated that the Enforcement Bureau was "actively investigating egregious indecency cases and [would] continue to do so." *Id.*

[21] *2013 Indecency Notice*, *supra* note 12.

[22] A Westlaw search on January 17 revealed over 1,200 articles mentioning "FCC" and "indecency." For a sampling of post-2004 scholarship on indecency, see, for example, CHRISTOPHER M. FAIRMAN, FUCK (2009); Clay Calvert & Robert D. Richards, *The Parents Television Council Uncensored: An Inside Look at the Watchdog of the Public Airwaves and the War on Indecency With its President, Tim Winter*, 33 HASTINGS COMM. & ENT. L.J. 293, 312 (2010–2011); Jerome A. Barron, FCC v. Fox Television Stations *and the FCC's New Fleeting Expletive Policy*, 62 FED. COMM. L.J. 567 (2010); Robert D. Richards & David J. Weinert, Punting the First Amendment's Red Zone: The Supreme Court's "Indecision" on the FCC's Indecency Regulations Leaves Broadcasters Still Searching for Answers, 76 Alb. L. Rev. 631 (2012-2013); Jessica C. Collins, Note, *The Bogeyman of "Harm To Children": Evaluating the Government Interest Behind Broadcast Indecency Regulation*, 85 N.Y.U. L. REV. 1225, 1244 (2010); Terri R. Day & Danielle Weatherby, *Bleeeeep! The Regulation of Indecency, Isolated Nudity, and Fleeting Expletives in Broadcast Media: An Uncertain Future for* Pacifica v. FCC, 3 CHARLOTTE L. REV. 469 (2012); W. Wat Hopkins, *When Does F*** Not Mean F***?:* FCC v. Fox Television Stations *and a Call for Protecting Emotive Speech*, 64 FED. COMM. L.J. 1 (2011).

[23] Statement of Commissioner McDowell, *supra* note 22 ("We owe it to American families and the broadcast licensees involved to carry out our statutory duties by resolving the remaining complaints with all deliberate speed. Going forward, the Commission must ensure that its indecency standards are clear, that broadcasters have the requisite notice and that Americans, especially parents such as myself, are secure in their knowledge of what content is allowed to be broadcast."); *see also* Statement of FCC Commissioner Ajit Pai on the U.S. Supreme Court's Decision in FCC v. Fox Television Stations, Inc., June 21, 2012, *available at* 2012 WL 2366333 ("Today's narrow decision by the U.S. Supreme Court does not call into question the Commission's overall

fundamental—indeed, revolutionary—ways in which the Commission's approach to the regulation of indecency has changed in the past decade. Indeed, the changes in doctrine, process, context, and regulatory justifications have been far more extensive than were either recognized by the Supreme Court or generally perceived in scholarship.

First, the Commission has significantly extended its regulation of broadcast indecency both substantively and procedurally.[24] From procedural changes designed to lessen complainants' burdens, to million dollar fines, to turning contextual analysis from a shield into a sword, to the development of what amounts to liability for negligent indecency, the agency's indecency regime has extended far beyond the fleeting expletives and instances of nudity at issue in the *Fox* cases.

Second, a bird's-eye view reveals that the Commission's indecency regime has ripple effects far beyond its official scope. Voluntary commitments by broadcasters to "zero tolerance" indecency regimes, as part of negotiated deals with the Commission, have effectively outsourced the agency's investigative and enforcement roles.[25] The Commission's enhanced attention to indecency has doubtless lent weight to pressures from interest groups on advertisers, resulting in at least some sponsor-based censorship.[26] Moreover, even though the Commission has not asserted jurisdiction to enforce its indecency rules beyond broadcasting, the reality of content distribution in media today, as well as the FCC's own must-carry rules, might well lead to their indirect impact in non-

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indecency enforcement authority or the constitutionality of the Commission's current indecency policy. Rather, it highlights the need for the Commission to make its policy clear.")

[24] *See, e.g.*, Levi, FIRST REPORTS, *supra* note 16, at 17–27.

[25] *Id.* at 32 (citing to Clear Channel "zero tolerance" policy).

[26] *See, e.g.*, Parents Television Council, Press Release, *PTC Releases Annual Ranking of Best and Worst TV Sponsors*, Nov. 19, 2012, *available at* http://w2.parentstv.org/Main/News/Detail.aspx?docID=2609 (last visited May 8, 2013).

broadcast media. That most of these developments have evaded judicial review is itself notable and troubling.

Third, the FCC's articulated rationales for regulating indecency—assisting parents and promoting an independent governmental interest in the protection of children—have also been quietly transformed. The rationale of assisting parents has shifted from temporal channeling designed to eliminate daytime indecency to "moral zoning" designed to provide a safe media space. The protection-of-children rationale has shifted focus from protecting individual children's psyches to the prevention of broader *social* harm. Most notably, the Commission has used the indecency context as a platform to float a proto-contractual regulatory rationale whose impact could be felt far beyond indecency regulation.

In total, the doctrinal and justificatory changes amount to a *sub rosa* transformation in FCC regulation. This Article argues that, whatever its constitutional status, this transformation is deeply problematic as a matter of policy. The FCC's substantive changes have quietly increased unaccountable administrative discretion to define aesthetic and journalistic necessity. The agency has conscripted broadcasters' own standards to bootstrap liability and adopted a presumptively inculpatory approach to the contextual assessment of indecency. The new regime has sacrificed expressive freedom in the service of a national cultural policy insulated from judicial review. The procedural changes have amplified the impact of pressure by political groups, structurally increased the likelihood of indecency findings, and significantly increased the chilling effect of indecency regulation. The Commission's penchant for resolution by settlement has imposed a private indecency regime more extensive than one that could legitimately be

adopted regulatorily, while simultaneously leaving the public at the mercy of broadcasters' presumably changeable decisions on private enforcement.

The Commission's approach is likely to entail some real and important social costs. Perhaps most importantly, today's indecency system is likely to chill the public-interest documentary programming of public radio and television.[27] Given the public benefit of programming created by entities unhampered by profit considerations, such a chilling effect on the already-beleaguered public broadcasting system is particularly troubling. Even on the commercial side, it is likely that at least some small-market stations will choose to avoid live local programming—such as news and sports—due to the expense of time-delay technology. Such a result cuts against the FCC's touted commitments to localism.

Similarly, the Commission's revised regulatory justifications raise more questions than they answer. Touted as a moderating move responsive to technological reality today, the safe zone approach is in fact an unrealistic attempt to wrest victory from the jaws of technological defeat. The Commission has not sufficiently addressed whether the notion of broadcast safe zones still makes sense in light of program-delivery convergence, and, if it does, whether less editorially invasive approaches could be

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[27] There are lessons to be learned, for example, from the fact that PBS advised its producers to self-censor after the FCC found indecent *The Blues: Godfathers and Sons*, a Martin Scorsese documentary on blues musicians. Notices of Apparent Liability And Memorandum Opinion and Order, 21 FCC Rcd. 2664 ¶ 72 (2006); Courtney Livingston Quale, *Hear an [Expletive], There an [Expletive], But[t] . . . the Federal Communications Commission Will Not Let You Say an [Expletive]*, 45 WILLAMETTE L. REV. 207, 257 (2008). Only 14 of 300 public television stations aired an unedited documentary on the Iraq war because of soldiers swearing under fire. *See* J. Gregory Sidak & Hal J. Singer, *Evaluating Market Power with Two-Sided Demand and Preemptive Offers to Dissipate Monopoly Rent: Lessons for High-Technology Industries from the Antitrust Division's Approval of the XM–Sirius Satellite Radio Merger*, 4 J. COMPETITION L. & ECON. 697, 718 (2008).

cultivated through technological means. As for the commitment to forestall social harms, the Commission's approach is not, as touted, either neutral or truly grounded on protecting children. Instead, it reflects the government engaging in cultural regulation—choosing a particular side in contested moral and political terrain. This choice is justified neither by concerns about government endorsement nor by a focus on the educative role of television. The Commission's attempt to send a symbolic message about appropriate social discourse is either ineffective or, where effective, unduly captured by the views of narrow ideological interests. Finally, the Commission's use of indecency as the platform for revival of a proto-contractual justification for regulation demonstrates the dangers of such a justification. The rationale fails to serve as an independent regulatory justification distinct from the careworn notions of broadcast scarcity and pervasiveness. It also lacks any inherent boundary and implicates concerns underlying the doctrine of unconstitutional conditions. That the government's articulation of this regulatory justification garnered apparent approval from some members of the Court in the *Fox* litigation raises the unfortunate possibility that the justification might be extended even beyond indecency.

The Commission might respond that its regulatory stance will remain reasonable in practice and that the enlargement of its powers in the abstract is not likely to have much practical importance—that its shadow regulatory transformations will remain in the shadows. But this subjects broadcasters to the potentially changeable whims of the censor. Broadcasters claim that deregulation will not lead to increased indecency on the airwaves. Yet the effectiveness of broadcaster self-regulation doubtless depends on the following factors: the competitive conditions in the industry as a whole, including cable;

the broadcasters' assessments of the FCC's power and appetite for enforcement at any given point; and the effectiveness over time of sponsor boycotts. Regardless of broadcaster and FCC promises, it is far from clear that the market will effectively constrain either.

In sum, the regulatory regime for indecency constitutes bad communications policy. Yet wholly deregulatory solutions advocated by broadcasters and some free speech proponents are not politically viable. This does not necessitate maintenance of the *status quo*, however. Instead, the FCC should return to a policy of restraint. Engaging in an exploration of the second-best, this Article makes three categories of suggestions in that spirit. It does so by focusing on each of the three central players in the indecency regulatory context—broadcasters, the FCC, and consumers.

First, with a view to minimizing the chilling effect of indecency rule violations for broadcasters, the Article proposes that the Commission revise its forfeiture policies and return to proportionality in the amounts of forfeitures assessed for indecency violations.

Second, the Article recommends institutional adjustments designed to improve the FCC's internal processes regarding indecency. Procedurally, the Commission should: 1) improve and make more transparent the ways in which it processes indecency complaints; 2) explore a clear rule regarding how to count and report complaints; and 3) revise its approach to indecency consent decrees. With regard to substantive standards, the Article recommends that the FCC consider: 1) adopting a presumption of no liability in close cases; 2) reversing the new "negligent indecency" approach and the broadcaster standards bootstrap; 3) dismissing complaints not submitted by actual program viewers; 4) using context to exculpate; 5) adopting a news exemption (or reversing its news-

related changes); 6) limiting the aesthetic necessity inquiry; and 7) considering economic hardship and whether the broadcaster is a public station.

Third, with a view to consumer empowerment, the Article suggests that the Commission explore the viability of methods designed to enhance public knowledge and transparency. Recognizing that consumer-oriented recommendations might ultimately be less effective than the other two categories of proposals, the Article nevertheless pushes the Commission to resolve its long-pending factfinding inquiry on ratings and blocking mechanisms. It also suggests that greater transparency with respect to the Monitoring Board that assesses the existing parental TV guidelines could bear fruit.

These suggestions might lead a reader to wonder whether there is not an inevitable tension between critiquing an administrative policy and making recommendations for increasing its efficiency. If the recommendations work, won't they ill-advisedly improve the enforcement of an untenable policy? If, on the other hand, they are inconsequential, then why bother? The Article attempts to straddle this tension because the first-best result is currently unlikely. In selecting among second-best recommendations, however, it does not seek simply to increase the efficiency of the indecency system. Instead, it attempts to find ways to improve the regime, lessen its coercive impact on speech, and promote regulatory reticence.

Section I sketches out the history of the FCC's approach to indecency on the air, describes the Supreme Court's responses—from *Pacifica* to *Fox I* and *II*, and attempts to assess the implications of what the Court did and did not say in its most recent decisions. Section II details not only the latest, most obvious policy changes addressed by the Supreme Court in the *Fox* cases but also the far less noted (and potentially more

consequential) procedural and substantive changes to the FCC's indecency scheme. Section III reveals the fundamental changes in the FCC's regulatory justifications for its indecency regime and lays out the complex political picture against which these evolutions have taken place. Section IV recommends a policy of FCC restraint on indecency enforcement and makes practical recommendations to serve as directions for the new restraint—guided by the goals of reducing the chilling effect of indecency enforcement on broadcasters, improving the indecency regulation process at the FCC, and empowering parents.